NO. 20953

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR LIRA AYALA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Central Division, adjudging appellant to be guilty as charged on all counts of a three-count indictment at the conclusion of a jury trial.

The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF CASE

On September 15, 1965, the Federal Grand Jury for the Southern District of California, Central Division, returned a three-count indictment in which appellant was charged in Count One with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of 867 grams of marihuana on August 23, 1965, in Count Two with knowingly and unlawfully selling and facilitating the sale of 867 grams of marihuana on August 23, 1965, to Antonio A. Celaya, an Agent of the Federal Bureau of Narcotics, and Count Three with knowingly and unlawfully transferring 867 grams of marihuana to Agent Antonio Celaya, of the Federal Bureau of Narcotics without obtaining from him a written order on a form issued for that purpose by the Secretary of the Treasury of the United States.

After appellant's arraignment and plea of not guilty to all counts of the indictment, appellant was tried on Monday, October 25, 1965, by a jury before the Honorable William J. Lindberg, United States District Judge, and was convicted of the offenses alleged in Counts One, Two and Three of the Indictment.

On November 4, 1965, appellant was adjudged guilty as charged and convicted and sentenced by the Honorable William J. Lindberg to five years imprisonment on each Count One, Two and Three to commence and run concurrently. Appellant thereafter filed timely notice of appeal.

III

ERROR SPECIFIED

Whether the trial court properly refused to instruct the jury on the question of entrapment.

IV

STATUTES INVOLVED

Counts One and Two of the Indictment allege a violation of Section 176(a) of Title 21, United States Code, which provides in pertinent part:

> "Whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than 20 years, and in addition, may be fined not more than $20,000.
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Count Three of the Indictment alleges a violation of Section 4742(a), Title 26, United States Code, which provides in pertinent part:

> "(a) General requirement --
>
> "It shall be unlawful for any person whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

V

STATEMENT OF FACTS

Federal Bureau of Narcotics Agent Antonio A. Celaya testified that he first saw the defendant on August 23, 1965, in front of the defendant's barbershop at 9849 Main Street, Cucamonga, California at approximately 9:30 P.M. [R.T. 10]. 1/ Agent Celaya testified that on the above date he was introduced to the defendant by a person named Jimmy Rodriquez, an informant. That they used a cover story when introduced to the defendant [R.T. 35]. Agent Celaya testified that the defendant said that he had one kilo of marihuana and that he wanted $140.00 for this kilo. There was a discussion as to price, with a final agreement of $140.00 for

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1/ "R.T." refers to Reporter's Transcript of Record.

the kilo of marihuana [R. T. 11]. Celaya testified that the defendant then walked to the rear of the barbershop, and into a grove of trees behind several buildings. Ayala reached into a rabbit hutch and removed two paper bound bricks of marihuana, and handed them to him. Celaya said that he then paid the defendant $140.00 government funds and left the area [R. T. 11]. Agent Celaya testified that on September 8, 1965, the defendant in his presence was interviewed by Agent Watson of the Federal Bureau of Narcotics after being told his constitutional rights [R. T. 14]. The defendant admitted to Agent Watson that he sold Agent Celaya narcotics on August 23, 1965 [R. T. 15]. Agent Celaya testified that at the time defendant handed him the narcotics, the defendant did not request nor was he handed a written order form for the transfer of marihuana [R. T. 23]. Agent Celaya also testified that on September 30, 1965, he served the defendant with a demand for an order form at the defendant's place of business, and that it was not produced [R. T. 24].

There was a stipulation after the testimony of Agent Celaya between the attorney for the appellant, and appellee that Government Exhibit No. 1 is marihuana and that the chain of possession had been established [R. T. 44].

Agent Harry J. Watson of the Federal Bureau of Narcotics testified that he had a conversation with defendant Ayala on September 8, 1965, at the defendant's place of business in Cucamonga, California. He said that he informed the defendant of his constitutional rights, and that defendant Ayala told him that he had

obtained the marihuana in Mexico from a man known as "El Guyo". Agent Watson asked the defendant why he was not able to furnish additional marihuana. The defendant said that he did not have the money to bring the marihuana from Mexico to Cucamonga [R. T. 47]. Agent Watson testified that he served the defendant with a written notice to produce a marihuana transfer order form. The defendant told him that he had no Government transfer form [R. T. 47].

Defendant, Arthur Ayala testified that on August 23, 1965, Agent Celaya of the Federal Bureau of Narcotics and a man by the name of Jimmy came to his barbershop [R. T. 60]. He said that he had known Jimmy about nine months prior to the 23rd day of August [R. T. 63]. Ayala stated that he sold marihuana to Agent Celaya after first seeing him about a half-hour on the 23rd of August [R. T. 67]. Ayala testified that he took the marihuana from the ground where it had been buried from three to five weeks in the backyard of his shop. He testified that he told no one where it was buried [R. T. 68]. He said that he did not know the marihuana had been illegally imported [R. T. 66].

VI

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE QUESTION OF ENTRAPMENT.

As defined in the legal sense in Ortega v. United States, 348 F. 2d 874 (9th Cir. 1965), quoting Black's Law Dictionary, "entrapment" means "the act of a government officer or agent inducing a person to commit a crime not contemplated by him. . . ."

Mathes and Devitt, "Federal Jury Practice and Instructions" on page 135, defines unlawful entrapment as follows:

> "Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case."

In order to determine whether the above principles have application in the present case it will be necessary to examine the testimony of the witnesses in detail on this matter.

Defendant, Arthur Ayala testified that on August 23, 1965, Agent Celaya of the Federal Bureau of Narcotics and a man by the name of Jimmy came to his barbershop [R. T. 60]. He said that he had known Jimmy about nine months prior to the 23rd day of August [R. T. 63]. Ayala stated that he sold marihuana to Agent Celaya after first seeing him about a half-hour on the 23rd of

August [R. T. 67]. Ayala testified that he took the marihuana from the ground where it had been buried from three to five weeks in the backyard of his shop. He testified that he told no one where it was buried [R. T. 68]. He said that he did not know the marihuana had been illegally imported [R. T. 66].

Defendant Arthur Ayala testified that he knew a person by the name of Ray. Ray owed him $150 to $175 dollars [R. T. 62]. He said that Ray came to his barbershop about a month prior to the 23rd of August, and said that he couldn't pay him, and left with him a bundle containing marihuana. Ayala testified that Ray asked him to see what he could do with the marihuana [R. T. 64]. Ayala said that he had known Ray for five years; that in the last six or eight months prior to August 23rd, Ray had not come to his barbershop often. He said that he had been after Ray to pay him. Ayala testified that he had no knowledge as to whether Ray was a special employee of the Narcotics Bureau [R. T. 62-63].

Federal Narcotics Agent Antonio A. Celaya testified to the following concerning "Ray" [R. T. 39-42]:

"Q. Mr. Celaya, isn't it a fact that you had a conversation with Mr. Ayala there for some time about selling you marijuana on August the 23rd?

"A. We spoke at some length, yes, sir.

"Q. Yes. Didn't he tell you that some fellow by the name of Ray had left that marijuana in his place of business?

"A. No, sir.

"Q. Was there ever any conversation with you that day concerning a person by the name of Ray?

"A. Not that I recall, sir.

"Q. Do you know a man by the name of Ray?

"A. I know several men by the name of Ray, sir.

"Q. Do you know anybody by the name of Ray who lived in that area in San Bernardino County?

"A. No sir, I don't.

Q. Do you know anybody by the name of Ray who has worked as a special employee of your department?

"A. Yes, sir.

"Q. Was that about August the 23rd or about a month prior to that date?

"A. Sir, if I'm not mistaken the Ray who worked as an informant for the Bureau is in jail and was in jail at that time.

"Q. Well, was he in jail about one month or two months prior to August, the 23rd?

"A. He well could have been, sir. I don't recall when he went to jail.

"Q. All right now, didn't Mr. Ayala tell you that a man by the name of Ray owed him some money and that Ray brought this marijuana to his business, his barber shop, and left that marijuana there?

"A. I don't recall him saying that, sir.

"Q. My asking you the question does not refresh

your memory about that portion of the conversation.

"A. No, sir, I don't recall that conversation.

"Q. How long prior to August the 23rd did you hear from Ray or have any contact with him?

"A. Six months, perhaps longer.

"Q. Did that have something to do with marijuana, your dealings with him?

"A. No, sir.

"Q. Did it have to do with narcotics?

"A. Yes, sir.

"Q. Isn't it a fact that Ayala told you that Ray had left that marijuana with him?

"A. No, sir, he did not tell me that."

Not one answer by Agent Celaya indicates that this alleged "Ray" had any connection with this case or at the relevant times in question was a Government informant or employee.

The testimony of Agent Watson concerning "Ray" is as follows [R. T. 50]:

"Q. Do you know a man by the name of Ray?

"A. I know many people by the name of Ray.

"Q. Yes, sir, do you know anybody that you have used as a special employee by the name of Ray?

"A. Many.

"Q. Did you use one who lived or had any transactions concerning marijuana in the San Bernardino

area about August of 1965?

"A. No, sir.

"Q. Did you use anybody by the name of Ray in San Bernardino County prior to August the 23rd?

"A. No, sir.

"Q. These several Rays that you know about, do they reside here in Los Angeles to your knowledge?

"A. Most of them live in this area, this general area.

"Q. Do any of them live toward the Pomona area?

"A. Not to my knowledge."

The testimony of Agent Watson does not in any way connect " Ray " with this transaction; it cannot be inferred that Ray was a Government employee or informant.

On direct examination Agent Watson testified that he had a conversation with defendant Ayala on September 8, 1965. Ayala told him at that time that he had obtained the marijuana in question from Mexico from a man known as "El Guyo". He also said the reason he was not able to furnish additional marihuana was that he did not have the money to bring the marihuana from Mexico to Cucamonga.

The above statements are directly contrary to what defendant Ayala testified to at the trial. The statements are also contrary to appellant's theory of entrapment, and shows its speciousness.

It is well settled that the doctrine of entrapment does not extend to acts of inducement on the part of a private citizen who is not an officer of the law.

Henderson v. United States, 237 F. 2d 169 (5th Cir. 1956);

Knott v. United States, 163 F. 2d 984 (5th Cir. 1947);

Jindra v. United States, 69 F. 2d 429, 431 (5th Cir. 1934);

Beard v. United States, 59 F. 2d 940 (8th Cir. 1932).

The defendant's theory of entrapment is clearly stated on pages 61 and 62 of the Reporter's Transcript. Appellant's attorney, in an offer of proof before the jury, indicated the following facts which he intended to prove: Ray owed the defendant a sum of money. Approximately a month or six weeks prior to the 23rd of August, Ray came to Ayala's barbershop and left marihuana with the defendant for safekeeping. He did not return to pay the money. Subsequently Jimmy came to the defendant's place of business with Agent Celaya; that Jimmy knew Ray. Agent Celaya was introduced as a man from Ventura who knew Ray, and that Celaya asked if Ray hadn't left some marihuana with the defendant. That after considerable conversation Ayala produced the marihuana in question, Celaya paid him $140.00 for it.

Appellant's attorney failed to elicit any testimony from any witnesses which established the factual situation outlined in his offer of proof. There was no evidence introduced that Ray knew Jimmy, the informant. There was no evidence that Celaya knew

Ray, and no evidence that Agent Celaya had asked if Ray hadn't left some marihuana with the defendant. The lack of testimony on the above, goes to the heart of appellant's theory of entrapment, "frame up" or the planting of contraband in the defendant's possession by the so-called "Ray" who is alleged to be a government informant.

Submission to the jury is not necessary when evidence of entrapment is entirely lacking, or there is no substantial evidence of same, or the uncontradicted evidence discloses no entrapment.

In Crisp v. United States, 262 F. 2d 68 (4th Cir. 1958), the Court of Appeals for the Fourth Circuit held that, where the evidence showed that a government agent purchased narcotics from the defendant through another party who did not know the official status of the agent, and where the party to whom the defendant gave the narcotics allegedly owed the defendant money, which the defendant would not receive without the sale of the narcotics, the evidence was insufficient to raise a jury question as to the defense of entrapment.

Vamvas v. United States, 13 F. 2d 347
(5th Cir. 1926);

Swallum v. United States, 39 F. 2d 390
(8th Cir. 1930);

United States v. Klein, 108 F. 2d 458
(7th Cir. 1939);

United States v. Markham, 191 F. 2d 936
(7th Cir. 1951);

United States v. Pisano, 193 F. 2d 355
(7th Cir. 1951).

The testimony of Agent Celaya regarding the purchase of marihuana [R. T. 10, 11] shows a negotiation concerning the price of the marihuana. Following this negotiation, the defendant went directly to the rear of the barbershop and into a grove of trees, reached into a rabbit hutch and removed two bricks of marihuana. This testimony indicates a readiness and willingness on the part of defendant Ayala, and negates possible entrapment.

The mere act of an officer in furnishing the accused an opportunity to commit the crime when the criminal intent was already present in the accused's mind is not ordinarily entrapment.

Bloch v. United States, 226 F. 2d 185
(9th Cir. 1959);
Sorrells v. United States, 287 U. S. 435 (1932);
Silva v. United States, 212 F. 2d 422
(9th Cir. 1954);
Demos v. United States, 205 F. 2d 596
(5th Cir. 1953).

The defendant cites Carson v. United States, 310 F. 2d 558 (9th Cir. 1962). In that case, the Court found that the evidence if fully credited by the jury, "tended to show that the criminal design with respect to the transaction in question originated with the employees of the Government and that Carson acquiesced therein only by reason of economic duress devised and exerted by these employees."

In the case before the trial Court, there was no evidence of economic duress or any duress by Government agents whatsoever, or that Government agents did anymore than afford the defendant an opportunity to commit the crime in question. Factually the two cases are not in point.

The defendant also cites Smith v. United States, 331 F. 2d 784 (D. C. Cir. 1964), as authority for his position, but that case is factually quite different from the case before the Court. In the Smith case, there was testimony, that the defendant Smith did not own, but was temporarily keeping for one Paris, contraband. Paris had given the narcotics to the defendant a half-hour or forty-five minutes before the defendant was arrested. Defendant Smith had testified that he had heard that Paris was a police informer. The defendant's testimony on this point was not rebutted by the Government.

In the case before the trial Court, there was no evidence that Ray was a Government employee or informant. Also the time interval during which the defendant possessed the contraband was not one-half hour as in Smith, but a month to six weeks according to the testimony of defendant Ayala.

The defendant also cites Johnson v. United States, 317 F. 2d 127 (D. C. Cir. 1963), in support of his position. In the Johnson case the Court said that the issue of entrapment arose because the conduct charged as criminal could be found to be attributable to the action of the officer (1) in supplying Government funds for the purchase of the narcotics, (2) through the direct

channel of an intermediary to the accused, (3) allowing the accused after the purchase and in the presence of the officer to retain some of the narcotics, (4) and the fact that at all times the officer provided transportation for execution of the plan.

The Court in Johnson said,

> "We do have, however, the furnishing by the officer of Government money, itself a persuasive factor, to an intermediary acting for the officer in carrying out the transaction, with a 'reward' to the accused of a part of its fruit. This is enough to raise a factual crime of official inducement for the jury to decide one way or the other."

In this case, the sale of the narcotics was directly to an agent of the Federal Bureau of Narcotics. The fact of letting the defendant retain some of the narcotics in Johnson was entirely missing in the case before the trial Court.

VII

CONCLUSION

1. Because there was no evidence in the entire transcript that anyone named "Ray" was employed as a Government employee or informant;

2. and, because there was no evidence of inducement or coercive tactics on the part of Government agents;

3. and because there is abundant evidence of a readiness and willingness on the part of defendant Ayala to engage in the sale of narcotics;

The trial Court did not err in refusing to instruct the jury on the issue of entrapment, and the judgment of the trial Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Marcus O. Tucker

MARCUS O. TUCKER